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OCTOBER TERM, 1899, No. 436.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

United States Rubber Co. et al., *Petitioners,*
vs.
American Oak Leather Co. et al.

Petition for Certiorari.
No. 436.

REPLY BRIEF ON MOTION FOR CERTIORARI.

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Respondents' counsel seem to us to be in error, in their contention that the Act of Congress establishing Circuit Courts of Appeals contemplated that a question, to review which *certiorari* may issue, must be one that the Court of Appeals might certify, and that this court should not issue a writ of *certiorari* when the question was one of fact or of mixed law and fact.

As a question of *power* this is clear from the wording of the Act. For the Act expressly confines the right to certify to questions of law by providing (Sec. 6) that "the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any *questions or propositions of law* concerning which it desires the instruction of that court for its proper decision,"

thus adopting the rule by which this court, under the former statute, confined the right of the Circuit Court to certify in case of disagreement of judges to questions of law. When, however, the same section confers upon this court the power to bring up cases otherwise final in the Court of Appeals its language is most general:

"In any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, *any such case* to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This clause, as this court has well said, was intended to vest in this court a "comprehensive and unlimited power," and one which is "co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal."

Forsyth v. *Hammond*, 166 U. S., 513-14.

Respecting the exercise—as distinguished from the existence—of the power to award *certiorari*, it may be generally true that when the writ is sought solely upon the ground of the importance of the question involved, such question should be one of law, as it is generally only such a question that can have any important bearing on the future administration of the law.

But where there arises an equal division of the judges of the lower courts upon a question, the writ ought to issue, not merely when necessary to settle the law for future litigants, but to award justice to the particular litigant in whose suit this division of judicial opinion occurs. In common law cases such division of opinion can ordinarily occur only upon questions of law, as contro-

verted questions of fact are not reviewable in the Court of Appeals. In chancery, however, the division of opinion may occur as well on a question of fact as of law, and when it occurs upon a question of fact, justice to the particular litigant calls for a decision thereof by this court as powerfully as if the division of opinion were upon a question of law.

But this discussion is not material here because a perusal of the opinions of the Court of Appeals will show that the question upon which the learned judges disagreed was not, as respondents' counsel claim, a question of fact.

All the judges in the lower courts concede that the petitioners, in taking their preferences, "had no conscious purpose to harm either present or future creditors." All concede the right of the debtor to prefer petitioners at the time these preferences were given. The preferences are condemned only because of the *method* in which the right of preference was exercised.

Hence, an essential question in the case was, whether a creditor attempting to take a preference at a time when, and in a state where, preferences were lawful, with *no purpose to harm either present or future creditors*, can be deprived of his debt because the method adopted to prefer is such as the law will not sanction.

This is purely a question of law. It involves no question of fact. It requires no resort to evidence. It arises on undisputed facts, on the face of the transaction itself. It is, moreover, a question of frequent recurrence and of grave importance to the business world.

Respondents' counsel claim the decision of this question turns upon whether or not there is fraud in fact. If this was so—which we deny—still the Court of Appeals'

opinion itself shows that petitioners were not in point of fact guilty of actual fraud, when that term is properly understood.

In respect to fraud in fact two questions arise: (1) What is fraud in fact? (2) Whether the evidence in the particular case shows this character of fraud? The second question is undoubtedly a question of fact, determinable at common law by a jury. The first question is clearly a question of law, which in a common law case it would be the province of the court to cover by instructions.

In the case at bar the learned judges did not disagree as to the facts of the transaction or as to the personal intentions of the parties, but they did disagree as to whether, in the absence of an intent to wrong other creditors, petitioners should be deprived of their claim.

If, as counsel contend, the judges here disagreed upon the question of fraud in fact, still their disagreement was not upon the facts, but upon the question whether, without a purpose or actual intent to wrong other creditors, there could be actual fraud. In other words, the point of disagreement in reality was upon the question, what, in a case of this character, constitutes actual fraud, the majority of these judges holding that it could exist without actual intent, and Mr. Justice Brown (concurring with Judge Grosscup) holding that it could not. Mr. Justice Brown adheres to the definition of actual fraud previously given by this court, and the two other learned judges—if respondents' counsel are right—apply a definition of actual fraud at variance with such decision.

Does actual fraud in the case of an attempt to prefer a *bona fide* debt require a conscious intent to wrong other

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creditors? Can it be predicated upon a transaction consisting of acts innocent in themselves, and where there was no wrongful purpose? This is in no sense a question of fact or of mixed law and fact. It is a pure question of law.

Furthermore, it will be noted that the majority opinion nowhere characterizes the action of the Metropolitan National Bank as actual fraud, nor negatives the finding of the master that such bank was not guilty of actual fraud. This emphasizes the position that the denial of petitioner's right to *pro rata* was not made by the majority of the Court of Appeals to turn upon the question of actual fraud.

Respectfully submitted.

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